IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-750

SEARS, ROEBUCK AND CO.,

Petitioner,

vs.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR SEARS, ROEBUCK AND CO.

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OPINIONS BELOW

The opinion of the California Superior Court for the County of San Diego is unreported and is reprinted as Petition Appendix (hereafter "Pet. App.") A. The initial decision of the California Court of Appeal, Fourth Appellate District, is reported at 49 Cal. App. 3d 232, 122 Cal. Rptr. 449 (1975), and is reprinted as Pet. App. B. The order of the Supreme Court of California granting a hearing and retransferring the case back to the Court of Appeal is not reported and is reprinted at Pet. App. C. The subsequent opinion of the California Court of Appeal is reported at 52 Cal. App. 3d 690, 125 Cal. Rptr. 245 (1975), and is reprinted at Pet. App. D. The opinion of the California Supreme Court is reported at 17 Cal. 3d 893, 132 Cal. Rptr. 443, 553 P. 2d 603, and is reprinted as Pet. App. E.

JURISDICTION

The opinion and judgment of the Supreme Court of California both issued on September 2, 1976. Pet. App. E. This judgment is final for purposes of review by this Court. *Market Street Ry. Co.* v. *Railroad Commission*, 324 U. S. 548, 551-52 (1944). This Court thereafter granted the petition for writ of certiorari on February 28, 1977. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED

Are state courts preempted by the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* (hereafter "the NLRA"), from framing and enforcing an injunction aimed narrowly at trespassory union activities on private property?

STATUTES INVOLVED

The relevant provisions of the NLRA and the California Penal Code, Calif. Code Ann. § 602, are reprinted as Pet. App. F.

STATEMENT OF THE CASE

Sears, Roebuck and Co. (hereafter "Sears") owns and operates a retail department store in Chula Vista, California. The store building stands by itself in the center of a rectangular-shaped piece of land. Walkways abut the building, and these in turn are surrounded on three sides by a parking area and on the fourth side by a blockwall fence that separates private dwellings from the store property. This property is posted against use by other than Sears' customers and against solicitation, distribution of handbills or other activity by non-employees. The Sears' property is surrounded by a wide public sidewalk, as well as curbs at the street, where those present are in full view of persons entering the Sears' store. App. pp. 15, 19, 21.

On October 26, 1973, the San Diego County District Council of Carpenters (hereafter "the Union") established a picket line, consisting of five pickets, on three of the private walkways adjacent to the store to protest the fact that Sears was having carpentry work performed by carpenters who had not been dispatched from the Union's hiring hall. Sears notified the pickets that they were on private property, requested that they leave the property immediately, and suggested that they picket on the adjacent public sidewalks. The pickets did leave, but all of them returned a short time later, and the picketing continued on Sears' property until the state court restraining order described below issued. App. p. 10. The Union's asserted position was that it "would not leave the store property unless legal action compelled them to leave." App. p. 14.

After it became apparent that the pickets would not leave voluntarily, Sears sought an injunction in the San Diego County Superior Court. That court issued a temporary restraining order on October 29, 1973, and a preliminary injunction on

November 21, 1973, enjoining the Union, its agents, representatives and members from picketing on Sears' property. Both orders expressly permitted picketing on the adjacent public property. Pet. App. A, pp. A2 and A3. Accordingly, on October 29, the pickets moved to the public sidewalks where, according to the California Court of Appeal, "Union sympathizers saw the pickets and refused to cross the lines . . ." Pet. App. A, p. A16. See also App., pp. 15-16. The picketing ceased on November 12, 1973. Pet. App. E, p. A33.

An appeal was taken by the Union to the California Court of Appeal which on two occasions affirmed the issuance of the injunction. Pet. Apps. B. and D. The Court of Appeal noted that a state court is not preempted from adjudicating matters "deeply rooted in local feeling and responsibility", and concluded that this "rule applies equally to trespass. The values of real property and one's right to peaceful possession and control over it, though certainly not absolute, are basic in our state and are deeply rooted in local feeling and responsibility." Pet. App. D., p. A20 (citations omitted). The California Supreme Court, however, reversed. It held that "federal law preempts both state and federal court jurisdiction of the controversy at hand, that such law confers exclusive jurisdiction on the National Labor Relations Board . . . and that to such rule of preemption there is no exception permitting state courts to exercise jurisdiction over peaceful labor activity merely because it involves trespass on private property." Pet. App. E, p. A33. The Court considered that it was bound by this Court's "most recent ruling", *viz.*, *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), which "precludes state court jurisdiction over the labor dispute before us." *Id.* at p. A44.

SUMMARY OF ARGUMENT

The National Labor Relations Act does not preempt "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act". *San Diego Building Trades Council* v. *Garmon*, 359 U. S. at 244 (1959) (footnote omitted).

Valid proscriptions on trespass are part and parcel of the states' "deeply rooted" interest in and responsibility for protecting the property of their citizens. Indeed, the very foundation of the common law system was society's desire to channel disputes over property into a judicial forum. In the absence of appropriate state authority, a property owner would be relegated to self-help remedies and the inevitable risk of physical confrontation and violence. The states' responsibility to maintain peace and order, accordingly, requires the power to enforce otherwise valid trespass laws. The NLRA was enacted against the backdrop of such laws, and, in the absence of congressional indication to the contrary, this historic area of local responsibility should not be disturbed.

Concurrent jurisdiction has been permitted in the past, and is required, where, as here, no remedy would otherwise exist for the victim of a civil wrong. A person, whether he be a property owner, as in this case, or a union member (*Vaca* v. *Sipes*, 386 U. S. 171 (1967)) cannot be denied his otherwise valid rights through the denial of a forum. If the decision below is affirmed, there would be absolutely no restraint upon even patently unlawful intrusions by union representatives upon private property. On the other hand, concurrent jurisdiction, while providing a forum for property owners, also would provide full protection for the rights of the unions, if any, to enter

upon private property. Such a right exists only in rare circumstances, and, when present, may be fully enforced by the state courts as they have historically done in related contexts. There is no reason to assume that the state courts would not fully enforce a union's right in the appropriate, exceptional circumstances. In fact the self-restraint and expertise of the state courts are substantial components in the implementation of national labor policy. See, *e.g.*, *Linn* v. *Plant Guards, Local 114*, 383 U. S. 53 (1966); *Farmer* v. *Carpenters, Local 25*, ... U. S. ....., 97 S. Ct. 1056 (1977); *Vaca* v. *Sipes, supra; Old Dominion Branch No. 496, Nat'l Assoc. of Letter Carriers* (hereafter "*Letter Carriers*") v. *Austin*, 418 U. S. 264 (1976); *National Labor Relations Board* v. *The Boeing Company*, 412 U. S. 67 (1973). Even if a state court should err, unions may seek relief from the National Labor Relations Board, which, if appropriate, would include a federal district court injunction restraining the property owner and the state courts. Thus, concurrent jurisdiction would obviate the creation of an undesirable "no law area" (*Taggart* v. *Weinacker's*, 397 U. S. 233 (1970)), and still protect the rights of both the property owners and unions."

ARGUMENT

I.

THE GARMON DOCTRINE DOES NOT PREEMPT A STATE COURT FROM ENFORCING ITS TRESPASS STATUTE AGAINST UNION AGENTS ON PRIVATE PROPERTY.

In *Garmon*, this Court established the general rule that "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U. S. at 245. "On the other hand, because Congress has refrained from providing directions with respect to the scope of pre-empted state regulation, the Court has been unwilling to 'declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions . . .' *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 289 (1971)." *Farmer* v. *Carpenters, Local 25*, 97 S. Ct. at 1061 (1977). *Garmon* itself, for example, set forth various exceptions to the general rule of preemption. One of those exceptions pertains to activity, which, as here, "touch[es] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U. S. at 244.[1]

1. No such "compelling congressional direction" exists in this case. The little guidance that exists in the legislative history of the NLRA indicates an intention not to preempt state laws where such laws affect "deeply rooted" state interests. See, *e.g.*, *Legislative History of the Labor Management Relations Act*, 1947, Vol. II at 941 (93 Cong. Rec. 1884, 1885), where Sen. Morse discussed "mass picketing":

> ". . . I am inclined to think that as far as a legislative remedy for its abuses is concerned it is one which should be solved

(Footnote continued on next page.)

A. The Protection of Private Property from Trespass Is An Interest Deeply Rooted in Local Feeling and Responsibility.

One of the principles most firmly embedded in Anglo-American law, dating back to the origins of the English common law, is that the unauthorized entry upon the land of another is a trespass.[2] While political philosophers may have long argued over the proper structure of government, most have agreed that a basic objective of government is the protection of its citizens and their property. The thrust of legal development has been to eliminate physical confrontation over property and to replace such combat with legal forums and governmental protection. John Locke, for example, affirmed this objective in his *Treatises on Government (Second Treatise)*, at § 87 (1690):

> "no Political Society can be, nor subsist without in itself the Power to preserve the Property, and in order thereunto punish the offenses of all those of that Society . . ."

Governour Morris reiterated this historic government interest in the protection of private property by drawing on Rousseau's

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> primarily by State legislation. . . . I think it is a matter which falls primarily within the province of the police powers of the State rather than within any of the delegated powers of the Federal Government."

Cf. *Dept. of Social Service* v. *Dublino*, 413 U. S. 405, 414 (1973) ("If Congress intended to preempt state plans and efforts in such an important dimension . . . such intentions would in all likelihood have been expressed in direct and unambiguous language."), and *Lodge 76, etc.* v. *Wisconsin Employ. Rel. Com.*, 427 U. S. 132 (1976) (Burger, C. J., and Powell, J., concurring).

2. Restatement (Second), Torts, Sec. 158 (One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, ...); 75 Am. Jur. 2d *Trespass* § 10, p. 14 (1964) ("Any entry on land in the peaceable possession of another is deemed a trespass, without regard to the amount of force used . . ." footnotes omitted); *State* v. *Quinnell*, 277 Minn. 63, 151 N. W. 2d 598 (1967) (criminal conviction of picket trespassing on private property for purposes hostile to the owner upheld).

Social Contract for his statements to the Constitutional Convention in 1787:

> "An accurate view of the Matter would nevertheless prove that property was the main object of Society. The savage State was more favorable to liberty than civilized; and sufficiently so to life. It was preferred by all men who had not acquired a taste for property; it was only renounced for the sake of property which could only be secured by the restraints of regular government."[3]

Private property rights not only are protected by the states, they also are "protected by the Fifth and Fourteenth Amendments" to the Constitution. *Lloyd Corp.* v. *Tanner*, 407 U. S. 551, 552-53 (1972). The states, as a result, are even precluded from invoking their own constitutions to engage in an unwarranted infringement of property rights. See, *e.g.*, *Lenrich Associates* v. *Heyda*, 264 Or. 122, 504 P. 2d 112 (1972); *Diamond* v. *Bland*, 11 Cal. 3rd 331, 113 Cal. Rptr. 468, 521 P. 2d 460 (1974), *cert. den.*, 419 U. S. 885 (1974).

This principle of government protection of private property is firmly embedded in the common law of this country. Every state has a statute or statutes which, like § 602 of the Calif. Penal Code, regulate such conduct and prescribe civil and/or criminal trespass sanctions. See Appendix A hereto. "The protection of private property . . . through trespass laws" is thus "historically a concern of state law". *Taggart* v. *Weinacker's*, 397 U. S. 233, 227 (1970) (Burger, C. J., concurring). Appropriate remedies, whether criminal or civil, have been afforded whenever conduct involved unwarranted entry upon the property of another, even though such conduct concerned, as here, activities by labor unions.[4] State trespass laws, after

3. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 244 (1969).

4. See, *e.g.*, *May Department Stores Company* v. *Teamsters Union Local 743*, 64 Ill. 2d 153, 355 N. E. 2d 7 (1976); *People* v. *Bush*, 39 NY 2d 529, 349 N. E. 2d 832 (1976); *Taggart* v.

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all, reflect a neutral public policy; they do not seek to accommodate "the special interests of employers, unions or the public in areas such as employee self-organization, labor disputes, or collective bargaining." *Lodge 76, etc.* v. *Wisconsin Employment Relations Committee*, 427 U. S. at 156 (Burger, C. J., and Powell, J. concurring).

The states' interest in, and responsibility for, protecting private property rights inextricably flow from the "overriding state interest . . . in the maintenance of domestic peace." *Association of Journeymen* v. *Borden*, 373 U. S. 690, 693 (1963). This responsibility is not limited merely to preventing the continuance of violence or threats thereof; it also involves preventing possible breaches of the peace or public disorders which are likely to result from the unauthorized invasion of another's property. The function of trespass actions in preventing such occurrences has long been recognized.

> "When a person refuses to leave another's property after he has been ordered to do so, a threat of violence becomes imminent. It was for this reason that the legislature made this type of trespass subject to criminal prosecution. *The basic purpose of the statute is the prevention of violence or threats of violence.*" (Emphasis added.)

People v. *Goduto*, 21 Ill. 2d 605, 609, 174 N. E. 2d 385, 387 (1961), *cert. den.* 368 U. S. 927. The corollary of the foregoing conclusion, reiterated recently by the Illinois Supreme Court, is that "an imminent threat of violence exists whenever an employer is required to resort to self-help in order to vindicate property rights." *May Department Stores* v. *Teamster Local No. 743*, 64 Ill. 2d 153, 162, 355 N. E. 2d 7, 10 (1976). There is, of course, as this Court has emphasized, a "deeply rooted" interest of the states in protecting their citizens against such

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Weinacker's, 283 Ala. 171, 214 So. 2d 913 (1968); *Moreland Corp.* v. *Retail Store Union*, 16 Wis. 2d 499, 114 N. W. 2d 876 (1962); and *Hood* v. *Stafford*, 213 Tenn. 684, 378 S. W. 766 (1964).

threats of violence.[5] This Court has never questioned that state courts are free, notwithstanding the NLRA, to exercise their "historic powers over such traditionally local matters as public safety and order . . ." *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, 749 (1941).

B. This Court Has Consistently Created Exceptions to the Garmon Doctrine Which in Principle Are Identical to the Instant Case.

A determination in this case that state courts are not preempted would be neither novel nor uncommon. In *Linn* v. *United Plant Guard Workers*, 383 U. S. 53, 62 (1966) for example, this Court noted that in several decisions of the Court "the 'type of conduct' involved, *i.e.*, intimidation and 'threats of violence' affected such compelling state interests as to permit the exercise of state jurisdiction." From the perspective of a State's interest "in protecting its citizens" (*Farmer* v. *Carpenters, Local 25*, 97 S. Ct. at 1063) it is of no consequence whether a threat or intimidation results from a malicious libel as in *Linn;* "overt" threats of violence (*United A. A. & A. I. W.* v. *Wisconsin Employment Relations Board*, 351 U. S. 266 (1955); the "outrageous conduct" of union officials (*Farmer* v. *Carpenters, Local 25*, 97 S. Ct. at 1064); or a picket's provocative disregard for the rights of others. See *May Department Stores* v. *Teamsters*, 64 Ill. 2d at 162, 355 N. E. 2d at 10. In each instance, the potential for "interference with the federal regulatory scheme" is insufficient to counterbalance the legitimate and substantial interest of the states. *Farmer* v. *Carpenters, Local 25*, 97 S. Ct. at 1065. Indeed, in the present case where, as discussed *infra* at p. 14, an illegal trespass would result in

5. See, *e.g.*, *International Union, U. A. A. & A. I. W.* v. *Russell*, 356 U. S. 634 (1957); *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (1953); *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740 (1941); and *United A. A. & A. I. W.* v. *Wisconsin Employment Relations Board*, 351 U. S. 266 (1955).

the absence of any legal remedy, if the decision below is sustained, there are arguably even more compelling circumstances than in other violence cases where the Court found that a federal remedy existed but was inadequate. Here, as in *International Union, U. A. A. & A. I. W.* v. *Russell*, 356 U. S. 634 (1958) and *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656 (1954), "Congress has neither provided nor suggested any substitute for traditional State court procedure. . . ." 347 U. S. at 663-664. There is, accordingly, no reason to assume that Congress desired to "remove the backdrop of state law that provided the basis" against which the NLRA was enacted. *Taggart* v. *Weinacker's*, 397 U. S. at 227-28. (Burger, C. J., concurring.)

Moreover, as in *Farmer* and *Linn*, there is no material countervailing factor to preclude state jurisdiction. The remedy afforded by the state courts would only conflict with rights existing under the NLRA in "rare cases" (Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity*, 83 Harv. L. Rev., 552, 553 (1970)) or, as one union counsel has phrased it, "exceptional circumstances".[6] Unions do not possess an inherent right to be on private property.[7] The NLRA

6. See SCHLOSSBERG (General Counsel, United Automobile Aerospace and Agricultural Implement Workers of America (UAW)), ORGANIZING AND THE LAW, A HANDBOOK FOR UNION ORGANIZERS 40 (1967).

> If a professional organizer hands out union literature on the ordinary employer's property over the employer's objection in the absence of the exceptional circumstances mentioned above, he does so without the protection of the Labor Act. The employer does not violate the law by posting his property. He is permitted to call the police to cause an arrest for trespassing, and finally he can, by self-help, use reasonable means to eject the organizer from the property. There is, however, no section of the Taft Hartley Act available to the employer in this situation.

7. See, *e.g.*, *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956); *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539; *The Falk Corporation*, 192 N. L. R. B. 716, 719, 722, 723 (1971) (employer not guilty of unfair labor practice in denying union

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"does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching [their desired audience]" *N. L. R. B.* v. *United Steelworkers of America*, 357 U. S. 357, 364 (1958). Rather, it is only the extraordinary situation in which no other reasonable alternative channels of communication are available that such a right exists.[8] In that instance,

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organizers entrance to its private property; *Babcock* held controlling); *GTE Lenkurt, Incorporated*, 204 N. L. R. B. 921, 922 (1973) (off-duty employees not allowed access to their employer's premises for organizational purposes); *Kimbell Corporation*, 177 N. L. R. B. 828, 831, 832 (1969) (forceful eviction of union organizer from employer's store upheld); *J. H. Rutter-Rex Mfg. Co.*, 164 N. L. R. B. 5, 12, 13 (1967) *enforced in part, remanded in part*, 415 F. 2d 1133 (6th Cir. 1969) (*Babcock* held controlling in finding of no unfair labor practice in removal of union representative from employer's property.)

8. In this case, for example the Union could have safely and effectively picketed, as it eventually did, on the public sidewalks adjacent to the Sears' store. Both this Court and the National Labor Relations Board have recognized that such means of communication are an effective alternative. See, *e.g.*, *Central Hardware* v. *NLRB*, 407 U. S. 539 (1972); *Lloyd Corp.* v. *Tanner*, 407 U. S. 551 (1972); *S. E. Nichols of Ohio*, 200 N. L. R. B. 1130. As the California Court of Appeal noted:

> The facts in the instant case, like those in *Central Hardware*, did not provide the court with adequate reasons for turning its back on the rights of the property owner. As in *Central Hardware*, we do not have a shopping center complex but a privately-operated single store. The Union's right to picket was not denied nor was there an unreasonable restriction on its right to communicate with the general public. The position of the pickets on the sidewalk was not any more hazardous and was just as effective. Union sympathizers did see and honor the lines. There was no showing any confusion existed as to the object of the Union's attack since the pickets at the parking lot entrance could communicate with all the persons dealing with Sears whose patrons were the only ones using the parking lot. We find the *Central Hardware* case to be controlling. There is nothing in the facts presented here to suggest in the balancing of respective interests the property owner *must* yield to the Union.

Pet. App. D, p. A29. (emphasis the Court's; footnote and citations omitted.)

whenever the necessity for a minimal "yielding" of property rights is required, the state courts are fully competent to recognize that necessity and abide by the federal law as construed by the National Labor Relations Board, the courts of appeals and this Court.

II.

CONCURRENT JURISDICTION IS ALSO REQUIRED WHERE NO FEDERAL REMEDY OTHERWISE EXISTS.

A. If Denied Access to State Courts, An Owner Has No Remedy for Illegal Trespass.

The decision of the Supreme Court of California, if affirmed, would for a property owner "inflexibly bar a hearing" and perhaps force him to "deliberately commit an unfair labor practice." *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 325-28 (White, J. dissenting). While "Congress . . . has provided no remedy to an employer within the National Labor Relations Act to prevent an illegal trespass on his premises" (*Taggart* v. *Weinackers*, 397 U. S. at 227 (Burger, C. J., concurring)), the *Garmon* rule would nevertheless be invoked to "blindly preempt other tribunals". *Motor Coach Employees* v. *Lockridge*, 403 U. S. at 326 (White, J., dissenting). The property owner would thus be forced to choose between either tolerating what could well be unlawful trespassory picketing on his property or risk the commission of an unfair labor practice by expelling the pickets. In addition, by utilizing self-help, not only is the property owner forced to subject himself "to a Board remedy but also to tort suits. That result is . . . undesirable. . . ." Come, *Federal Preemption of Labor-Management Relations: Current Problems in the Application of Garmon*, 56 Va. L. R. 1435, 1444 (1970). This choice, which "denies the employer a day in court" is "an extraordinarily heavy price to pay in order to avoid the danger that state tribunals may sometimes err. . . ." Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1362-63 (1972). It constitutes a

remedial vacuum which "aggravates the State's concern . . ., encourages the victim to take matters into his own hands" and thus "vitiates the ordinary arguments for preemption." *Linn* v. *Plant Guards, Local 114*, 383 U. S. at 64, n.6.

This denial of process also contravenes a "basic concept of fundamental fairness." *Motor Coach Employees* v. *Lockridge*, 403 U. S. at 327 (White, J., dissenting). The absence of a forum to adjudicate the validity of a trespass necessitates that there be concurrent jurisdiction in the state courts; "no later hearing and no damage award . . . can undo the fact that an arbitrary taking . . . has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.'" *Fuentes* v. *Shevin*, 407 U. S. 67, 82 (1972) (citation omitted). Denying a property owner a judicial remedy emasculates that owner's right to control his property. It is no different a situation, in effect, than if the state had created an easement on the owner's property for public use without just compensation. See, *e.g.*, *Lloyd Corporation* v. *Tanner*, 407 U. S. at 567-570; *Lenrich* v. *Heyda*, 504 P. 2d at 115; Comment, *Recent Cases*, 86 Harv. L. Rev. 1592 (1973).

The additional ramifications of preempting the application of state trespass laws are wholly undesirable. If the decision below is affirmed, notwithstanding what location a union selects to engage in its activities, Sears and all other owners would be unable to obtain relief. Yet there is no dispute that a union's right to enter on private property is limited; a union, for example, would not be entitled to maximize its pressure by picketing inside a store or even in all cases inside a shopping center. See, *e.g.*, *Marshall Field & Co.* v. *N. L. R. B.*, 200 F. 2d 375 (7th Cir. 1952); *S. E. Nichols of Ohio*, 200 NLRB 1130, 1132 (1972). Nevertheless, a union, under the "no-man's land" created by the California Supreme Court, could picket inside the Sears' store and be entirely insulated from any judicial or administrative authority even though such conduct would be

both violative of state law and unprotected under federal law. A union could, for example, trespass on private property with impunity to engage in organizational activities notwithstanding that it may have no right to do so under *N. L. R. B.* v. *Babcock & Wilcox, supra,* and *Central Hardware* v. *N. L. R. B., supra.* Many similar problems would arise if the decision below is affirmed. See *Motor Coach Employees* v. *Lockridge,* 403 U. S. at 506 (White, J., dissenting). Congress, it is submitted, did not intend "to confer upon unions such unlimited discretion to deprive injured . . . [owners] of all remedies" (*Vaca* v. *Sipes,* 386 U. S. 171, 186) through the denial of an owner's fundamental, indeed constitutional, right to a hearing.[9]

B. Concurrent Jurisdiction Would Not Deprive the Union of a Remedy.

If a property owner's efforts to restrict union activity were, in fact, unlawful under federal law, a union would not be left without a remedy. In contrast to the situation confronting an owner, as described above, the union could initially file a charge with the National Labor Relations Board, and the Board's General Counsel, the prosecutorial arm of the agency (see *N. L. R. B.* v. *Sears, Roebuck and Co.,* 421 U. S. 132 (1975)), would be free to seek preliminary injunctive relief in federal court under Section 10(j) of the NLRA. 29 U. S. C. § 160(j). If the state courts had already acted, any injunction could be vacated in the event the Board found in favor of the union. In "the highly unlikely event that the [state] . . . court would refuse to vacate the injunction in these circumstances, the Board could provide relief by seeking to enjoin

9. To deny an owner the opportunity to vindicate his rights denies him due process of law raising constitutional doubts as to the validity of the decision below. See p. 18, n.10, *infra.* The rules of statutory construction militate strongly against interpreting the NLRA in such a manner. See *United States* v. *Harriss,* 347 U. S. 612, 618 (1954); *American Power and Light Co.* v. *S. E. C.,* 329 U. S. 90, 107-08 (1946); *Ex Parte Mitsuye Endo,* 323 U. S. 283, 299 (1944).

the order of the state court. *N. L. R. B.* v. *Nash-Finch* (1971), 404 U. S. 138." *May Department Stores* v. *Teamsters, Local 743,* 64 Ill. 2d at 164, 355 N. E. at 12. The effect of a state court order, therefore, is only to maintain the *status quo* until such time as the union's rights, if any, are determined. Indeed, even in the absence of state court jurisdiction, an owner could resort to self-help and physically exclude a union. State court jurisdiction, therefore, would neither "present a potential conflict with Federal labor policy, nor . . . adversely affect rights granted the union by the NLRA." 64 Ill. 2d at 164, 355 N. E. 2d at 12.

There is, in addition, no reason "to assume . . . that a state will so construe its law . . ." as to conflict with a union's rights under the NLRA. *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. at 746. Concurrent jurisdiction is not unusual in labor law; the states and the Board both have authority in cases involving libel (*Linn* v. *Plant Guards, Local 114, supra*), other tort actions (*Farmer* v. *Carpenters, Local 25, supra*), breach of a union's duty of fair representation (*Vaca* v. *Sipes, supra*) and, as noted above, picketing where there have been threats of violence or actual violence. *United A. A. & A. I. W.* v. *Wisconsin Employment Relations Board, supra.* In each of these "partial preemption" situations the state courts must carefully examine each "factual setting" to determine whether the alleged conduct is either preempted or covered by state law. *Letter Carriers* v. *Austin,* 418 U. S. at 293. Similarly, under *Garmon,* the state courts must define when conduct may reasonably be deemed "arguably protected." In fact, in one situation directly related to the NLRA, this Court afforded the state courts exclusive freedom "to apply state law to such issues" because "the expertise" is more "evident in a judicial forum". *N. L. R. B.* v. *The Boeing Company,* 412 U. S. at 76-77 (1973). In short, national labor policy is heavily dependent on the self-restraint of the state courts. By the same token, it is the courts of

equity, not the Board, that have had the historic duty to accommodate conflicting statutory schemes and to delineate the limits of property rights. These tribunals have in similar contexts been summoned by this Court or required by the Constitution to accommodate state property rights and federal rights of expression. See, *e.g.*, *Amalgamated Food Emps., et al.* v. *Logan Valley Plaza, et al.*, 391 U. S. 308 (1968); *Franceshina* v. *Morgan*, 346 F. Supp. 833 (S. D. Ind. 1972); and *Folgueras* v. *Hassle*, 331 F. Supp. 615 (W. D. Mich. 1971). Accordingly, it is doubtful that "the Board brings substantially greater expertise to bear on these problems than do the courts." *Vaca* v. *Sipes*, 386 U. S. at 181. There is, therefore, no legitimate reason to deny a property owner his fundamental right to a hearing.[10]

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10. In *Fuentes* v. *Shevin*, this Court succinctly emphasized the importance of the "right to be heard" (407 U. S. at 87):

> The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake. . . .

In the instant circumstances the owners would in fact succeed on the mertis in all but the rare or exceptional cases. See p. 12, *supra*. Surely then, the foregoing rationale requires a similar result here.

CONCLUSION

For the foregoing reasons, Sears, Roebuck and Co. respectfully prays that the judgment of the Supreme Court of California be reversed and that this case be remanded to that Court with instructions to assert jurisdiction.

Respectfully submitted,

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APPENDIX A

STATE CIVIL AND CRIMINAL TRESPASS STATUTES

1. Alabama—Ala. Code Tit. 14 § 426.
2. Alaska—Alaska Stat. § 11.20.610 *et seq.*, Criminal Law punishable by jail.
3. Arizona—Ariz. Rev. Stat. § 13-711 *et seq.*, Criminal Code —Misdemeanor.
4. Arkansas—Ark. Stat. Ann. § 41-4212 *et seq.*, Criminal Code—Misdemeanor.
5. California—Cal. Pen. Code § 602 *et seq.* (West), Tit. 14 Malicious Miscellaneous Trespass; prev. Tit. 13 Crimes Against Property Misdemeanor.
6. Colorado—Colo. Rev. Stat. § 18-4-502 *et seq.*, Criminal Code Offenses against Property Criminal Trespass.
7. Connecticut—Conn. Gen. Stat. Ann. § 53a-107 *et seq.* (West), Criminal Trespass.
8. Delaware—Del. Code Ann. Tit. 11 § 820 *et seq.*, Criminal Trespass 823.
9. Florida—Fla. Stat. Ann. § 821.01 *et seq.* (West), Section called "Crimes".
10. Gerogia—Ga. Code Ann. § 26-1503 and § 105-1400, Criminal Code—Criminal Trespass".
11. Hawaii—Haw. Rev. Stat. Tit. 37 § 813 *et seq.*, Penal Code—Criminal Trespass.
12. Idaho—Idaho Code § 18-7008, "Crimes and Punishment" Misdemeanor.
13. Illinois—Ill. Ann. Stat. Ch. 38 § 21-3 *et seq.* (Smith-Hurd).
14. Indiana—Ind. Code Ann. § 35-43-2-2 (Burns).

15. Iowa—Iowa Code Ann. § 810.12 *et seq.* (West), "Crimes".
16. Kansas—Kan. Stat. Ann. § 21-3721, Criminal Trespass.
17. Kentucky—Ky. Rev. Stat. Ann. § 434 B.1.060 *et seq.*, Criminal Trespass.
18. Louisiana—Law Rev. Stat. Ann. § 14.63 *et seq.* (West), Criminal Law—Criminal Trespass.
19. Maine—Me. Rev. Stat. Ann. Tit. 14 § 7551 *et seq.*, Tit. 17A, § 402 *et seq.*
20. Maryland—Md. Code Ann. Art. 27 § 57, "Crimes and Punishment".
21. Massachusetts—Mass. Ann. Laws Ch. 266 § 113 *et seq.*, (Michie/Law Co-op) Crime against property—jail term.
22. Michigan—Mich. Stat. Ann. § 28.814 *et seq.*, "Crimes" Misdemeanor.
23. Minnesota—Minn. Stat. Ann. § 609.60 *et seq.* (West), Criminal Trespass.
24. Mississippi—Miss. Code Ann. § 95-5-1, 97-17-85 *et seq.*, Criminal Trespass.
25. Missouri—Mo. Ann. Stat. § 537.330, 560.447 *et seq.* (Vernon), Criminal Trespass—Misdemeanor.
26. Montana—Mont. Rev. Code Ann. § 94-6-203 *et seq.*, Criminal Trespass.
27. Nebraska—Neb. Rev. Stat. § 28-588 *et seq.*, Criminal Trespass.
28. Nevada—Nev. Rev. Stat. § 207.200 *et seq.*, Miscellaneous Crimes—Misdemeanor.
29. New Hampshire—N. H Rev. Stat. Ann. § 635.2 *et seq.*, Criminal Trespass.
30. New Jersey—N. J. Stat. Ann. § 2A:63-1 (West), § 2A: 170-31, *et seq.*, Criminal Trespass—Civil Trespass.
31. New Mexico—N. M. Stat. Ann. § 40A-14-1 *et seq.*

32. New York—N. Y. Penal Law § 140.00 *et seq.* (McKinney), Criminal Trespass.
33. North Carolina—N. C. Gen. Stat. § 14-126, 14-160 *et seq.* Criminal Trespass.
34. North Dakota—N. D. Cent. Code § 20.1 *et seq.*
35. Ohio—Ohio Rev. Code Ann. § 2911.21 (Page), Criminal Trespass.
36. Oklahoma—Okla. Stat. Ann. Tit. 21 § 1351, 1768, "Crimes Against Property" Misdemeanor.
37. Oregon—Or. Rev. Stat. § 164.245 *et seq.*, Criminal Trespass.
38. Pennsylvania—Pa. Cons. Stat. Ann. Tit. 18 § 3503 *et seq.* (Purdon), Criminal Trespass.
39. Rhode Island—R. I. Gen. Laws § 11-44-1 *et seq.*, Criminal offenses.
40. South Carolina—S. C. Code, "Crimes and Offenses" § 16-381 *et seq.*
41. South Dakota—S. D. Compiled Laws Ann. § 22-34-4 *et seq.*, "Crimes" not called trespass, "Malicious Misdemeanor § 22-13-15 Refusal to leave-crime", "Civil" § 40-28-5.
42. Tennessee—Tenn. Code Ann. § 39-4500 *et seq.*, "Crimes" Misdemeanor.
43. Texas—Tex. Penal Code Ann. § 30.05 (Vernon), Criminal Trespass.
44. Utah—Utah Code Ann. § 76-60-1 *et seq.*, Penal Code fines; jail.
45. Vermont—Vt. Stat. Ann. Tit. 13 § 3701 *et seq.*, "Crimes" fines; jail.
46. Virginia—Va. Code § 8-866 *et seq.*, "Civil"; § 18.1-173 *et seq.* "Crimes".
47. Washington—Wash. Rev. Cod § 9A.52.010 *et seq.* Criminal Code, Criminal Trespass.

48. West Virginia—W. Va. Code Ann. § 61-3-33 *et seq.*, "Crimes against Property", Entry upon enclosed land not called trespass.
49. Wisconsin—Wis. Stat. Ann. § 943.13 *et seq.* (West), Criminal Trespass.
50. Wyoming—Wyo. Stat. § 6-226 *et seq.*, Crimes and Offenses.